

14859 *Cohen*

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

T

FILE: B-197854.2; B-199555, DATE: September 10, 1980
B-199556

MATTER OF: Embassy House, Inc. *DLG04908R*

DIGEST:

1. Prior decision is affirmed where [request for reconsideration] fails to advance factual or legal grounds upon which reversal would be warranted. New protests of later procurements on same bases as those rejected in prior decision therefore are summarily denied.
2. GAO is without authority to determine what records must be released by another agency in response to request under Freedom of Information Act.

Embassy House, Inc. requests that we reconsider our decision in Embassy House, Inc., B-197854, July 7, 1980, 80-2 CPD 15, in which we denied the firm's protest against the award of a contract by the Defense Logistics Agency's Defense Personnel Support Center (DPSC) to supply tea under invitation for bids DL13H-80-B-7949. Embassy House also protests the award by DPSC of contracts to supply tea under solicitations DL13H-80-B-8952 and DL13H-80-R-9095 essentially for the same reasons that were argued in the earlier protest. *AGC00847*

Our prior decision is affirmed, and the new protests are summarily denied.

Earlier Protest

Embassy House had protested that the standard which the offered tea was required to meet, and the "organoleptic" method of testing tea for conformance with the standard, were too subjective. The standard is known as the "A-2 Standard"; "organoleptic" involves appeal

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to the senses. The A-2 Standard is a blend of five popular national teas intended to reflect the different quality that each emphasizes for the purpose of achieving a broad appeal.

Embassy House also contended that the inclusion on the testing panel of members of the tea industry's Tea Association could have resulted in the testing being biased in favor of a particular Tea Association member. In this respect, a particular testing panel will include as chairperson the Food and Drug Administration's Supervisory Tea Examiner, and two tea testers from the Tea Association not connected with any prospective bidder. DLG 05203

In our July 7 decision we first pointed out that our Office is not in a position to substitute our judgment for DPSC's with respect to the standard and quality of tea that should be served to Department of Defense personnel as long as that judgment is reasonable and provides for the maximum practicable competition to meet the Government's minimum needs.

We then stated that we could not conclude that the requirement that bidders meet the admittedly subjective A-2 Standard is an unreasonable means for DPSC to purchase tea, or prejudiced Embassy House in that procurement. The reason for our position essentially was that every bidder, including one that supplies tea for the A-2 Standard, similarly must blend its teas to create a blend which it believes will meet the standard.]

In response to the remainder of the protest, we noted that the record stated that organoleptic tea testing is the universal practice in the buying and selling of tea; that no acceptable chemical tea testing methodology has been developed to date; and that the Tea Association was a convenient source of tea testing expertise, which largely rests outside of the Government. We then reviewed the testing procedures prescribed for organoleptic tea testing in DPSC procurements. We concluded:

"We believe that these procedures--with their coding, blind testing, uniformity in sample preparation, use of two prepared standard samples for comparison--contain as adequate

safeguards against bias as practical in this admittedly subjective activity."

Request for Reconsideration and Protests

In the request for reconsideration and the newly-filed protests, Embassy House in large part only reiterates the arguments which we fully considered in connection with our July 7 decision. The only new matters raised are Embassy House's concern that the identities of the Tea Association members selected for the particular testing panels in the three procurements have not been disclosed to the bidders, and that bidders were not provided with the specific reasons why their samples were rejected.]

With respect to the first point, the record shows that Embassy House has filed a request with DPSC under the Freedom of Information Act, 5 U.S.C. § 552 (1976), for the names of the Tea Association members on each of the three tea testing panels.] We have been informally advised by DPSC that since the panels were chaired and convened by a Food and Drug Administration employee, DPSC does not have that information, and therefore has forwarded Embassy House's request to the Food and Drug Administration.) Our Office has no authority under the Freedom of Information Act to determine what information must be released by an agency in response to a request under that statute.] Carol L. Bender, M.D.; National Health Services, Inc., B-196912; B-196287, April 1, 1980, 80-1 CPD 243.

Regarding advice to bidders as to the reasons for the rejection of their tea samples, the record developed in response to Embassy House's earlier protest included such advice regarding the solicitation then in issue, and the letters by which Embassy House has filed its new protests indicate that the firm in fact was advised of the reasons in connection with both DPSC solicitations.

Since Embassy House's request for reconsideration of our July 7 decision fails to demonstrate any error of law or fact therein, the decision is affirmed. 4 C.F.R. §20.9(a) (1980). The protests against awards under the two other DPSC invitations, based on the same arguments already considered and rejected in the earlier decision, therefore are summarily denied.

We note here that Embassy House has requested a conference in our Office in connection with the new protests. However, in view of the above, we do not believe that a conference would serve any useful purpose.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States